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No. 82-131

In the Supreme Court of the United States

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION,
owner or owner pro hac vice of Barges 1011,
1384, 1400, 1363, and others in a fleet,
Petitioner,

vs.

HOWARD E. PFEIFER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

Brief For Respondent

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QUESTIONS PRESENTED

1. Whether §905(b) of the Longshoremen's and Harbor Workers' Compensation Act permits a longshoreman to sue his employer in negligence as vessel owner, where the employer is acting simultaneously in the dual capacity of vessel owner and of stevedore.

2. Whether the lower court acted within its discretion in utilizing the total offset method in calculating respondent's lost future earnings as the most fair, efficient and comprehensible formula which complies with the principles of the Longshoremen's and Harbor Workers' Compensation Act.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief For Respondent

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 678 F.2d 453 (3d Cir. 1982) and is reproduced as Appendix A to the Petition for Writ of Certiorari. The opinion of the United States District Court for the Western District of Pennsylvania has not been reported and is reproduced as Appendix B to the Petition for Writ of Certiorari and in the Joint Appendix. (J.A. 61-78).

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by Petitioner, relevant statutory provisions include the following sections of the Longshoremen's and Harbor Workers' Compensation Act:

33 U.S.C. §902 Definitions

When used in this Act... (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

COUNTERSTATEMENT OF THE CASE

Petitioner, Jones & Laughlin Steel Corporation (hereinafter "J & L") appeals from the judgment entered against it on April 15, 1981 in the amount of $275,881.35 less any benefits received by Respondent, Howard E. Pfeifer, (hereinafter "Pfeifer") under the Longshoremen's and Harbor Workers' Compensation Act from October 30, 1980, the date of trial, until the date of payment of the judgment by J & L.

Pfeifer brought this action pursuant to Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) (hereinafter "LHWCA"), to recover damages from J & L for personal injuries sustained as the result of J & L's negligence.

Pfeifer was employed by J & L as a landing helper on its coal barges. At the time of Pfeifer's accident, J & L had a fleet of approximately thirty-five (35) coal barges at its No. 1 landing, which vessels J & L owned, managed and operated, or was owner *pro hac vice* of said vessels. (J.A. 62). On January 13,

1978, Pfeifer slipped and fell because of ice and snow that had accumulated on the gunnel of a barge on which he was working. He struck a barge rail and landed on his tailbone, and a heavy electric motor that he was carrying fell in his lap. He has not returned to work since the accident. He has been examined by a number of physicians, several of whom testified at the trial, and he has undergone extensive physical therapy.

In this non-jury action, the District Court found that J & L was negligent and that its negligence was the proximate cause of Pfeifer's accident and resulting injury. It determined further that Pfeifer was completely disabled from the date of the accident until July 1, 1979, and that thereafter he was capable of doing "light work" and lifting weights of up to twenty-five pounds, but that he could not return to work on the river.

The District Court determined that, as a vessel owner *pro hac vice*, J & L was liable for negligence under §905(b) of the LHWCA. In measuring damages, the District Court declined to consider future wage increases, inflationary effects, or to discount the award to present value, citing *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). The District Court multiplied Pfeifer's 1978 annual wage by his work life expectancy, deducted the amount of compensation Pfeifer had received under the LHWCA, and subtracted his projected earnings at minimum wage from July 1, 1979, until his sixty-fifth birthday.

J & L does not challenge the District Court's findings that J & L was negligent and that its negligence was the proximate cause of Pfeifer's injury, nor does it contend that it was not correctly found to be an owner *pro hac vice*.

SUMMARY OF ARGUMENT

Respondent was properly awarded $275,881.36 in a negligence action against his own employer as a vessel owner *pro*

hac vice under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act. All circuits which have addressed this issue after the 1972 amendments to the LHWCA were in effect have found that an injured employee may assert a cause of action in negligence against a vessel owner which is also the injured party's employer under Section 905(b) of LHWCA. This Court reviewed the LHWCA in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981) and established criteria for negligence as compared to the former criteria of unseaworthiness. The Third Circuit reexamined *Griffith v. Wheeling Pittsburgh Steel Corp.*, 657 F.2d 25 (3d Cir. 1981) following *Scindia* and found that a negligence cause of action against the vessel owner-employer was permitted, which are the precise facts that involved Respondent when he was injured. Further, in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), this Court discussed the same question and recognized that a suit by the injured employee against the vessel-owner was permitted pursuant to the LHWCA. The legislative history to the 1972 amendments of the LHWCA specifically recognizes the existing law, as established in *Reed v. The Yaka*, and Congress worded §905(b) of the Act to preserve the cause of action filed herein by Respondent. Furthermore, a proposed amendment to the Act presently in Congress which makes changes to §905(b), makes no change in the context of the claim of Respondent against J & L presently before this Court. Therefore, a cause of action is available to a longshoreman against a vessel owned or controlled by his employer and the judgment of the Third Circuit must be affirmed.

The lower court utilized the total offset method as a matter of federal law in calculating Pfeifer's future wage loss damages. The Longshoremen's and Harbor Workers' Compensation Act itself has no set method of calculating future wage losses in a negligence action against a vessel. The lower court properly utilized the most efficient and comprehensible

method of calculating damages by including inflation as a factor and offsetting this by eliminating the reduction to present worth by any percentage interest rate. The district court utilized the case of *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), which was a Pennsylvania Supreme Court case which adopts the so called Alaska Rule or total offset method. *Kaczkowski* also permits a separate finding for productivity increases, however this factor was not present in the Pfeifer record. J & L failed to present evidence of any nature to support its present argument that expert testimony concerning future interest rates should have been utilized. For this reason J & L has waived any argument contesting the lower court's damages calculation. Even if the argument had been properly preserved, federal law authorizes reference and resort to state law in fashioning a federal measure of damages. There is no confusion or conflict among the circuits on the issue of whether future inflation is to be considered. The issue is whether or not a standard method of calculation should be utilized or whether each circuit is permitted to continue to utilize the method it determines to be most appropriate. Respondent has set forth calculations, comparing various methods showing that the total offset method does not necessarily produce the highest possible verdict to the plaintiff. However, Respondent urges that this Court adopt it because it is the most simple, efficient, predictable and least expensive for parties to utilize. Furthermore, the differences in utilizing other methods are not necessarily significant. The total offset method has been cited and followed in other types of cases with satisfactory results and represents the most predictable, efficient and just method of calculating lost future earnings.

ARGUMENT

I. THE LOWER COURT WAS CORRECT IN ALLOWING PLAINTIFF TO PROCEED IN A NEGLIGENCE ACTION AGAINST HIS OWN EMPLOYER AS A VESSEL OWNER *PRO HAC VICE* UNDER SECTION 905(b) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

In the case *sub judice*, the Third Circuit's decision, which affirmed that of the District Court, is clearly correct and in accordance with applicable decisions of this Court and of federal appellate courts.

It has been conclusively established by the federal courts of appeal that an injured longshoreman may assert a cause of action in negligence against a vessel owner which is also the injured party's employer under Section 905(b) of the LHWCA. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), *on appeal after remand*, 610 F.2d 116 (3d Cir. 1979), *vacated sub nom. American Commercial Lines, Inc. v. Griffith*, 451 U.S. 965 (1981), *reinstated on remand*, 657 F.2d 25 (3d Cir. 1981), *cert. denied*, 102 S.Ct. 1767 (1982); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977).

Griffith v. Wheeling Pittsburgh Steel, supra, established that a longshoreman employee may sue the vessel pursuant to 33 U.S.C. §905(b), notwithstanding the fact that the vessel is owned, directly or *pro hac vice* by his employer.

The lower court's conclusions of law are correct. Judge Cohill's opinion states:

> In 1972, Congress amended the Longshoremen's and Harborworkers' Compensation Act of 1927 (hereinafter "LHWCA"), 33 U.S.C. §§901-950, fundamentally changing the basis for a longshoreman's action against a vessel

> owner. Under the Act as amended, a vessel owner is no longer strictly liable for a longshoreman's injuries on the basis of unseaworthiness or nondelegable duty, or for a stevedor's negligence under a *respondent superior* theory. Instead, "an owner [is] liable to an injured longshoreman only for its own negligence that proximately caused the injury." (citations omitted).
>
> The Third Circuit has held that '[Section] 905(b) imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case' that would be applicable to a land based business.' (J.A. 71, 72).

The Third Circuit considered new briefs and additional opinions filed in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and concluded that its prior judgment in *Griffith* was consistent with the Supreme Court's interpretation of Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905(b), and should be reinstated.

Judge Gibbons, in reinstating the judgment in *Griffith*, held that the facts in *Scindia* were clearly distinguishable from the facts in *Griffith* and accordingly *Scindia* would be clearly distinguishable from this case. He restated the three criteria contained in the District Court's fourth conclusion of law in *Pfeifer*, that is: (1) that the vessel knew or by exercise of reasonable care could have discovered the condition on board ship that lead to the injury; (2) that the vessel knew or should have known that the condition would impose an unreasonable risk of harm to longshoremen working on board the ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger. *Griffith*, 657 F.2d at 27.

The lower court in *Pfeifer* found that the defendant, J & L, was the owner *pro hac vice* of the barges in the fleet at its No. 1 landing on January 13, 1978. It applied the standard of care set

forth in *Griffith* to the facts of this case and found that J & L, as owner *pro hac vice* of the barge on which plaintiff was injured, was negligent. (J.A. 72, 73).

In *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), *reh. denied*, 444 U.S. 889 (1979), which is not mentioned in J & L's brief, this Court interpreted Section 905(b) as affording a longshoreman a cause of action in negligence in a situation "where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company." 443 U.S. at 264. Justice White, speaking for the Court in *Edmonds*, cited with approval *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967), and *Reed v. The Yaka*, 373 U.S. 410 (1963), noting that, in both cases, it had upheld a longshoreman's *negligence* or unseaworthiness action against the shipowner-stevedore. 443 U.S. at 264 n. 13.

This Court in *Edmonds, supra*, recognized that §905(b) of the LHWCA entitles a longshoreman injured because of the negligence of the vessel to sue the shipowner-employer for damages without regard to his statutory benefits. It discussed the first two sentences of §905(b) in detail. The two sentences state:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. 33 U.S.C. §905(b).

This Court commented:

> the [first] sentence neither expressly nor implicitly purports to overrule or modify the traditional rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore, whose limited liability is fixed by statute, is partly to blame.
>
> The second sentence of the paragraph is expressly addressed to the different and less familiar arrangement where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company—in short, to the situation where the ship is its own stevedore. *Id.* at 264.

This Court did not distinguish between employer or non-employer vessel owners in recognizing the existence of a cause of action in negligence against a longshoreman's employer-vessel owner. It held that:

> This is said to be preposterous and contrary to the legislative intent to treat the vessel that provides its own stevedoring services just like other shipowners when and if it negligently causes injury in its capacity as a shipowner and just like other stevedores when it negligently injures in the course of providing its own loading or unloading services. *Id.* at 265.

This Court concluded:

> The second sentence means no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself,

which are precisely the facts in this case. *Id.* at 266. In its decision, this Court expressly interpreted the 1972 Amendments as "preserv[ing] the longshoremen's tort action against shipowners acting as shipowners." *Id.* at 264 n.12.

The legislative history of the 1972 Amendments of the LHWCA, as reflected in H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698-4705, indicates that one of the most controversial and difficult issues which the Committee had been required to resolve in connection with this bill concerned the elimination of the unseaworthiness remedy. It was concluded that given the improvements in compensation benefits which this bill would provide, it would be fair to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels that third party claims were to be predicated on negligence rather than the no-fault concept of seaworthiness. *Id.* at 4703. This would place vessels in the same position, insofar as third party liability is concerned, as land based third party and non-maritime pursuits. The Committee report states that actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land based person providing a safe place to work. *Id.* at 4704.

> The Committee has also recognized the need of special provisions to deal with a case where a longshoremen, shipbuilder, or repairman is employed directly by the vessel. In such case, notwithstanding the fact the vessel is the employer, the Supreme Court in *Reed v. S. S. Yaka*, 373 U.S. 410, (1963); and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371, (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes the rights of an injured longshoreman, shipbuilder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor.... The Committee's intent is that the same principles should apply in determining the liability of the vessel which employes its own longshoreman, shipbuilders or repairman as apply when an independent contractor employs such persons." H.R. Rep.

No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4705 (footnotes omitted).

In *Reed v. The Yaka, supra*, this Court stressed that the liability of the ship or its owner should not depend on the status of the longshoreman's employer. The logic of this result is apparent from the facts of the instant case itself. There were approximately 35 barges in the fleet when Pfeifer was injured. (J.A. 62). Not all were owned by J & L. For that reason, J & L's liability was founded on liability as owner *pro hac vice* of the barges, as authorized by §902(21) of the LHWCA. Such liability is designed to afford an injured longshoreman such as Howard Pfeifer the opportunity to recover damages in a third party negligence action, in cases where the actual owner of the barge in question cannot necessarily be proven. It would be preposterous, contrary to the legislative intent as stated in *Edmonds* and discriminatory treatment to a stevedore to deny his cause of action if the happenstance of his fall occurs on an employer-owned vessel, yet affirm his cause of action if he falls on a non-employer-owned vessel in the same fleet. Unless this reasoning is followed, there would be no logic in Congress' including *pro hac vice* in its definitions of vessel at 33 U.S.C. §902(21). Clearly such an anomolous result was never intended by Congress when the 1972 Amendments were passed and the logic underlying *Reed* and *Jackson* was expressly approved. *See Chiasson v. Rogers Terminal & Shipping Corp.*, 679 F.2d 410, 414 (5th Cir. 1982) (where injury to longshoreman is due to negligence of shipower-employer in non-stevedoring operations, Section 905(b) does not act as bar to recovery); *Griffith*, 521 F.2d 31 (employer has two different liabilities—one as owner and operator of vessel, one as stevedore company which in *latter* case has liability only for compensation).

When the 1972 amendments to the Act were enacted, they dealt with four considerations (1) the level of benefits, (2) extension of coverage to additional workers, (3) third party

suits against persons other than the employer, and (4) administrative matters. In general, compensation benefits payable by the employer to the injured worker were increased, and as a tradeoff to stevedoring employers, the liability imposed on shipowners and stevedores under the doctrines enunciated in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) and *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) was expressly overruled. There is nothing else in the Act benefiting the employer to the detriment of the employee, as J&L argues. To the contrary there was absolutely no attempt to modify the express ruling of the *Yaka* decision with its approval of third party actions against employer-vessel owners. *See* Franco, *The Vessel as Employer Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act—The Yaka Lives On*, 23 Loy.L.Rev. 571, 576 (1977).

As Pfeifer urges, the legislative history establishes that Congress was well aware of the Supreme Court actions in this area, and in considering these decisions, Congress had to and did face the question whether in the 1972 revisions here under review, Congress should make any distinction between injured harborworkers employed on one hand by independent contractors and those employed by the vessel owner directly. It chose, in effect, legislatively to adopt (or ratify) the Supreme Court's *Yaka-Jackson* choice. *Chiasson v. Rogers Terminal and Shipping Corp.*, 679 F.2d at 414. *See Lorillard v. Pons*, 434 U.S. 575 (1978) (Congress is presumed to be aware of judicial interpretation of statute and to adopt that interpretation in new law to extent new law incorporates prior law); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. J.J. Curran*, ____ U.S. ____, 102 S.Ct. 1825 (1982) (evaluation of Congressional intent must take into account its contemporary legal context). Had Congress in 1972 intended to go further, and to modify existing Supreme Court precedent by eliminating third party actions against employers, it would have expressly done

so, as was specifically done with the legislative overruling of the *Sieracki* and *Ryan* cases. Congress' failure to do this, despite its clear awareness of the *Reed* and *Jackson* doctrine and its express reference to those cases in the co.itemporaneous legislative history to the amendments, reveals a clear intent on the part of Congress to preserve the injured longshoreman's negligence cause of action against a vessel owner-employer. *Lorillard v. Pons, supra; Lewis v. United States,* 663 F.2d 889 (9th Cir. 1981). Furthermore, J & L's contention that the "exclusive liability" provision of §905(a) serves to preclude Pfeifer's action against the vessel owner here totally ignores the fact that the language utilized by Congress in §905(a) is identical to the exclusivity language which the Supreme Court, in interpreting §905 of the 1927 Act, had held did *not* preclude a third party action in negligence against an employer-vessel owner. *Reed v. The Yaka, supra; Jackson v. Lykes Bros. Steamship Co., supra.* Since Congress in 1972 was aware that this exclusivity language was not being interpreted as precluding third party actions against negligent employers, J & L cannot seriously argue that by reenactment of this language in identical form in 1972, Congress intended to effect a change in the law.

Legislation is currently pending before Congress attempting to amend Section 905(b) to bar negligence actions brought by shipyard employees against their employers. *See* S. Rep. No. 97-498, 97th Cong., 2nd Sess. 4, 19, 31-33, 50 (1982); 128 Cong. Rec. 9213 (daily ed. July 27, 1982). Significantly, the proposed amendment only affects shipyard employees, i.e. ship repairman, shipbuilder, or shipbreaker. None of these classifications fit Pfeifer's status of Barge Landing Helper. (J.A. 62). Interestingly, the Committee Report discusses *Griffith v. Wheeling Pittsburgh Steel Corp.*, but does not recommend its overrule by legislation, and in fact accommodates its ruling in the future amendment. *Id.* at 32-33. The proposed Amendment validates Pfeifer's argument that any change in the LHWCA should be done by Congress, and that the

LHWCA as presently enacted was properly applied by the lower court. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Specifically, had Congress intended in the 1972 Amendments to bar actions by longshoremen against negligent employers as vessel owners, there would have been no need to amend the LHWCA to forbid actions by shipyard employees against their employers under the proposed 1982 Amendment. Furthermore, by reflecting a possible change in attitude in 1982, and a desire to bar *certain* negligence actions heretofore available under the 1972 Amendments, Congress has demonstrated a clear understanding that the 1972 Amendments did not bar negligence actions by longshoremen against their employers as vessel owners, and that even in 1982, there is no intention to bar a cause of action by a longshoreman such as Howard Pfeifer who falls outside the class of shipyard employees as defined in the proposed legislation. Although not controlling in terms of ascertaining Congressional intent at the time of passage of the 1972 Amendments, this subsequent legislative history is a useful aid in ascertaining legislative intent. *Id.* at 118 n. 13; *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980). Further, when coupled with the 1972 legislative history discussed, it clearly indicates Congressional intent to afford Pfeifer a cause of action here.

Had Congress intended through the 1972 Amendments to eliminate third party actions against vessel-owner employers under §905(b), Congress would have expressly done so in language akin to the proposed legislation currently pending before Congress. Furthermore, even assuming Congress now intends through the 1982 proposed legislation to modify existing law and to bar certain negligence actions against vessel-owner employers, the fact that this legislation is restricted to shipbuilders, repairmen and shipbreakers indicates that Congress has no intention of changing the existing law with respect to longshoremen such as Howard Pfeifer who fall outside this category. Nor has Congress ever evidenced any dissatisfaction

with the present interpretation of the Act nor attempted at any time to eliminate all causes of action by longshoremen against their vessel-owner employers. Clearly, had the provisions of the LHWCA as heretofore interpreted been unacceptable and contrary to the legislative intent, Congress would have amended the Act in a fashion far different than the 1972 Amendments, and would clearly have taken action to amend the Act in the wake of the *Griffith* and *Napoli* decisions which were announced as many as seven years ago. *See Lewis v. United States, supra* (Congressional silence in wake of Supreme Court's *Feres* decision, barring governmental liability for service-related injuries to military personnel, and Congress' failure to amend Federal Tort Claims Act in response to decision, was viewed as affirmance of doctrine enunciated therein).

J & L incorrectly argues that there is a sharp division among the federal courts of appeal on this issue; to the contrary, a review of the decisions cited by J & L demonstrates the absence of any conflict in the circuits. *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir 1976), and *Arvidson v. Dillingham Corp.*, 462 F.2d 1 (9th Cir. 1972), *cert. denied*, 409 U.S. 983 (1972), cited by J & L, both involved interpretations of the LHWCA *prior* to the 1972 Amendments to the Act, and in no respect control the issue of J & L's liability under §905(b) of the 1972 Act. Furthermore, the interpretation of the pre-1972 LHWCA in *Murphy* is entirely dictum because the First Circuit was without a sufficient record to determine whether the injured employee was covered by the LHWCA or whether the applicable state workman's compensation statute controlled. 545 F.2d at 237, 240-241. *Murphy* and *Arvidson* are further distinguishable in that the employees in question had been compensated under the state workman's compensation law, rather than the LHWCA, as in the case *sub judice*. Arvidson is still further distinguishable because it did not involve a vessel in navigation.

The remaining cases cited by J & L on this issue, *Houston v. Bechtel Associates Professional Corp.*, and *O'Rourke v. Long*, do not reflect the decisions of any federal court of appeals, and therefore present no conflict with the well-established decisions of the Second, Third and Fifth Circuits. *Houston v. Bechtel Associates Professional Corp.*, 522 F.Supp. 1094 (D.D.C. 1981) is also distinguishable because no vessel was involved and the claim was solely for punitive damages. *O'Rourke v. Long*, 41 N.Y.2d 219, 391 N.Y.S.2d 553, 359 N.E.2d 1347 (1976) involved a ten year old newspaper carrier's compensation claim, in no respect involved interpretation of the LHWCA, and surely cannot be relied on as a basis for interpreting the 1972 Amendments here.

There is no indication in either the language or legislative history of the amended Longshoremen's Act that vessel owners who serve in the dual capacity of stevedore-employers are to be treated differently than any other owners. If the goals of the legislators are to be fulfilled, both categories of owners must bear equal responsibility for the consequences of their negligence as owners. Congress did not, as Petitioner argues, write an act making all owners equal, but providing that some owners are more equal than others.

The same arguments raised by J & L concerning the 1972 LHWCA amendments were carefully considered in *Griffith, supra*. The Third Circuit's interpretation of §905(b) affording Pfeifer a cause of action in negligence against J & L properly represents the holding which has been rendered by all circuits which have addressed the issue, is fully supported by this Court's decision in *Edmonds*, is in complete conformity with the legislative history underlying the 1972 Amendments, and has not been challenged by any controlling decision of the Federal Courts of Appeal. Therefore, a cause of action in negligence is available to a longshoreman against a vessel owned or controlled by his employer and the judgment of the Third Circuit must be affirmed.

II. THE LOWER COURT PROPERLY APPLIED THE TOTAL OFFSET METHOD AS A MATTER OF FEDERAL LAW IN CALCULATING PFEIFER'S LOST FUTURE EARNINGS DAMAGES.

After determining that Pfeifer had stated a valid cause of action in negligence against J & L as vessel owner, and that J & L's negligence had caused Pfeifer serious injuries, the district court thereupon calculated Pfeifer's damages award. In arriving at this award, the court based its calculations on the finding that Pfeifer was completely unable to work from January 13, 1978, the date of the accident, to July 1, 1979. After July 1, 1979, the lower court found that Pfeifer was capable of doing light work in his reduced capacity from July, 1979, until his presumed date of retirement on his 65th birthday, June 27, 1990. Multiplying Pfeifer's annual wage at the time of the accident in 1978 of $26,025.00 by Pfeifer's work expectancy of 12.5 years, the court calculated Pfeifer's projected earnings at $325,312.50, without regard to inflation or cost of living increases. The court then reduced its figure by $66,352.00, representing Pfeifer's projected earnings at minimum wage over the eleven year period during which Pfeifer was found capable of performing light work. To this figure, the court added $50,000 to compensate Pfeifer for pain and suffering sustained. The court then reduced the amount by the amount of compensation paid to Pfeifer from the date of injury to the date of trial, arriving at a final damages award of $275,881.36.[1]

[1]The Court's calculations were as follows:

$325,312.50	projected earnings at present wage
- 66,352.00	projected earnings at minimum wage
$258,960.50	
+ 50,000.00	pain and suffering
$308,960.50	judgment
- 33,079.14	less compensation paid to date of trial
$275,881.36	final judgment less any compensation paid from date of trial to date of payment. (J.A. 77).

In arriving at this calculation, the district court applied what has been described as the total offset method of calculating damages, as originally developed by the Supreme Court of Alaska in *Beaulieu v. Elliott*, 434 P.2d 665 (Ala. 1967), and as approved and adopted by the Supreme Court of Pennsylvania in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). This method of calculation was developed to consider the fact that inflation has been present in the United States since 1950 and has been suggested to be a common continuing characteristic of modern economics. The total offset method assumes as a matter of law that the discount rate for prospective damages will offset the rate of inflation. *Beaulieu v. Elliott, supra.*

The presence of inflation plays two distinct roles in an award for prospective damages. The first role is determining the impact of inflation on the future earnings of the victim. The second is in determining the appropriate interest rate to discount the future damage award to present value. *Kaczkowski v. Bolubasz*, 491 Pa. at 565 n.4, 421 A.2d at 1029 n. 4 (1980). This court in *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490, 494 (1980), held that other aspects of a damage award computation, specifically including future inflation "are also matters of estimate and prediction." The Third Circuit in *Pfeifer* solved the problem of estimate and prediction when it held:

> It [the total offset method] makes a judgment—evaluative to be sure, but no better or no worse than the varying prognostications of expert witnesses—that the rate of future inflation will be equivalent to future interest rates. 678 F.2d at 461.

The total offset method is particularly appealing when compared with other approaches in the contexts of predictibility, efficiency and accuracy. *See* W.T. McGough, Jr., *Future Inflation, Prospective Damages and the Circuit Courts*, 63 Va.L.Rev. 105, 125 (1977). There is no argument at this time that both future inflation and future interest rates co-vary

significantly and depend on each other. *See Inflation: A Survey*, 85 Econ.J. 741, 788 (1975); Gibson, *Interest Rates and Inflationary Expectations: New Evidence*, 62 Am.Econ.Rev. 854 (1972). Relying on extensive economic literature on the subject , the court in *Kazskowski* found the total offset method superior to other methods of damage calculation in terms of efficiency and predictibility, and equal, if not superior, in regards to accuracy of result. It was for these sound policy reasons that both the district court and the Third Circuit approved application of the total offset method in calculating Pfeifer's damages. Both courts recognized that there is imprecision in determining correct future rates and there is no perfect solution. Because precise prediction of the real rate of interest may not be possible, the cost of this uncertainty should be imposed upon the culpable, not the innocent party. *Kaczkowski*, 491 Pa. at 582, 421 A.2d at 1038; 63 Va.L.Rev. at 132.

There exists no great confusion or conflict among the circuits as to the issue of future inflation and the extent to which the effects of inflation should be taken into account in calculating damage awards. To the contrary, the vast majority of jurisdictions have held that future inflation is properly to be taken into account in calculating loss of future earnings. *Doca v. Marina Mercante Nicaraguense, S. A.*, 634 F.2d 30 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977); *United States v. English*, 521 F.2d 63 (9th Cir. 1975); *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975); *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974) (decided under FELA as a matter of federal damages law); *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982); *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982). Significantly, even the Fifth Circuit, which had previously

prohibited the introduction of evidence concerning the effects of inflation or lost future income, has reversed its position and now allows inflationary factors to be considered in maritime personal injury actions. *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982); (en banc), *overruling Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.) (en banc).

There is a certain commonality among all cases concerning future damages or projected lost earnings. The purpose is to assure the Plaintiff enough money to compensate him in the future for the rest of his working life depending on his physical circumstances and the amount of wages lost as a result of the injury. A fair method must include known and future contractual, cost of living and productivity increases. *Kaczkowski v. Bolubasz, supra.* To this is added the problem of adjusting for inflation and reduction to present value based on the probability that money will earn income in the future at unknown rates. There are many cases on this subject attempting to arrive at a fair result. However, the intricacies and applications of so many theories have failed to arrive at a common method of calculation. The leading cases are *Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (D.Conn. 1974), *aff'd*, 524 F.2d 384 (2d Cir. 1975); *Doca v. Marina Mercante Nicaraguense, S.A., supra; Culver v. Slater Boat Co., supra; and Pfeifer v. Jones & Laughlin Steel Corporation, supra.*

Doca adopted a two percent (2%) reduction to present worth, which in that Court's opinion reflected a difference between inflation and earning power. The Petitioner, J & L, requests an adoption of *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979), which discusses the admissibility of expert testimony by economists projecting the level of future wage increases, cost of living increases, and future interest rates again using uncertain predictions. Most of the cases cite *Chesapeake and Ohio Railroad v. Kelly*, 241 U.S. 485 (1916) opining that a reduction to present worth is required. There is no argument with that. *Kelly* was cited and followed by the Third

Circuit in *Pfeifer*, 678 F.2d at 461, where the Third Circuit found that the total offset method embodies the continued requirement of reduction to present worth. This Court should recognize that *Kelly* in its own words stated: "We are not in this case called upon to lay down a *precise rule or formula* and it is not our purpose to do this." 241 U.S. at 491. (emphasis added). *Pfeifer* in fact utilizes a reasonable and economically sound method by assuming that for purposes of the instant cause of action the future rate of inflation and future interest rates will offset each other. When this result is compared with another method, the total offset method yields results more favorable to the defendant without wandering off on the economic expert trail into the unknown future.

COMPARISON OF PFEIFER'S PROJECTED LOST EARNINGS BY REDUCING TO PRESENT WORTH

Lower Court's (J.A. 77) Findings— Total Offset	This calculation, patterned after *Doca*, includes lost future wages at the time of trial without cost of living increases, reduced by 2% (for 11 years to present worth) plus lost wages to time of trial (Exhibits 2.1, 6, 7, 10) (Ex. J.A. 351-367, 402-405) (J.A. 41-42, 74, 309-312)
$325,312.50	$ 33,722.00 wages at time of trial
- 66,352.00	- 6,848.00 minimum wage offset
$258,960.50	$ 26,874.00
	x .97868 2% factor—11 years
	+ 78,033.00 lost wages to time of trial
	$341,043.00

Therefore, the total offset method gives a result comparable to any other method, and is more acceptable because it is efficient, predictable yet does not require the time, expense and conjecture of introducing opposing experts.

The issue here is not whether the total offset method must be followed as a matter of federal common law in all cases. The issue is simply whether the Third Circuit was correct in approving the trial court's discretionary use of the total offset method as one method of calculating damages. Given that the total offset method is the most efficient method of calculating damages, is easy of application, saves substantial amounts of court time, is predictable in terms of awards and becomes a catalyst for settlement of cases, the action taken below was clearly within the court's discretion, and represented a prudent method of calculating damages.

J & L has cited *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) for the proposition that this case involves a maritime tort, a type of action which the Constitution has placed under the national power to control with respect to its substantive as well as procedural features, and that maritime torts have unique case law covering damages. The fact is that *Hawn* does not address itself to damages in any respect, and the maritime law is in no respect limited in its development to reliance on federal precedent. Thus, it is well established that a federal court may properly borrow substantive state law and adopt it as federal law in calculating an award of damages. *Pfeifer*, 678 F.2d at 457. *See generally D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring). This is particularly appropriate in the instant action where, unlike the antitrust treble damage statute, the LHWCA statute is silent as to the measure of damages to be applied. As a result, the lower court was clearly authorized as a matter of law to look to state law in fashioning a federal measure of damages, and the Third Circuit's decision was fully in accord with applicable federal precedent as established in this Court. *See Imbler v. Pachtman*, 424 U.S. 409 (1976); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Monroe v. Pape*, 365 U.S. 167 (1961); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). *See also Matter of Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981).

Further support for this position is found in the opinion of this Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-374 (1959), wherein Justice Frankfurter stated:

> to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce... Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers as they have played joint roles in the development of maritime law throughout our history.

As recognized by the Third Circuit in *Pfeifer*, damages in maritime cases, or in statutory cases against the United States, have consistently followed the state law. *See Downie v. United States Lines Co.*, 359 F.2d 344 (3d Cir. 1966), *cert. denied*, 385 U.S. 897 (1966) (plaintiff injured by tortious conduct of the vessel was entitled to damages commensurate with nature and extent of his injuries, to reimbursement for loss of earnings, past, present and prospective, for any impairment of his earning capacity, for medical expenses incurred and to be incurred and any other economic loss he may have sustained or was likely to sustain, and to redress for his physical injury, including effects thereof, such as pain, suffering, mental anguish, discomfort and inconvenience). This approach is emphasized in the discussion in Gilmore and Black, *The Law of Admiralty*, Ch. VI §6-61, at 468 (2d ed. 1975), which states:

> Between 1950 and 1970 the Supreme Court revolutionized the law relating to maritime personal injury litigation. In the Introductory Note to this long Chapter we suggested that what the Court did in this field was not in any sense an isolated phenomenon or an aberation attributable to half a dozen Justices; it was part and parcel of the judicial revolution which has reshaped our law of civil obligations during the post-World War II period. Not infreqently the

> personal injury cases seemed to present a problem of choice between a federal or maritime law rule and a state common law or statutory rule. The Court never allowed itself to become doctrinaire or inflexible on this issue. State law rules which were not inconsistent with the Court's reformulation of the substantive law were allowed to continue to influence the results in litigation. The federal solution was reserved for cases in which results consistent with the reformulated substantive law required the application of an old-or the fashioning of a new-rule of maritime law. The Court's business is deciding cases, not spinning out symmetrical webs of jurisprudential theory. The opinions delivered in the sequence of cases we have been discussing may occasionally offend logician but should not offend lawyers. In that respect the post-*Moragne* era is not likely to be greatly different from the pre-*Moragne* era.

In addition, it should be noted that J & L's argument that the court below improperly applied the total offset method as a matter of state law is plainly without merit. The Third Circuit expressly found that the district court applied the total offset method as a matter of federal law in calculating damages. 678 F.2d at 456-457. The Third Circuit further found that J & L had failed to properly contest the application of the total offset method below, thereby waiving any argument to the effect that the total offset approach had been applied as a matter of state law. *Id.*

Besides having waived the above arguments, J & L has also waived any argument concerning the lower court's application of the total offset method, by failing to introduce any evidence at trial in support of the reduction of the damages award to present worth. In order to secure an award under the guidelines presently adressed by J & L, Petitioner was required by Local Rule 5 II 2(b) of the United States District Court of the Western District of Pennsylvania to file a copy of an expert

report with the substance of the facts, findings, opinions and a summary of the grounds or reasons for the opinion of any expert it expected to call as a witness at the trial. J & L failed to list any expert witness (J.A. 20-22), failed to offer or introduce any evidence in support of the application of a discount rate, and failed to supply any basis for the purported proper discount rate to be applied. J & L's citation of *Chesapeake & Ohio Railway Co. v. Kelly, supra,* is misleading in the context that evidence had to be offered by it in support of reduction to present value. Argument without evidence is precluded on appeals such as this. *Skill v. Martinez,* 677 F.2d 368, 371 (3d Cir. 1982).

Unlike J & L, which offered no evidence as to the proper calculation of damages, Pfeifer, in his supplemental pre-trial statement (J.A. 24, 25), set out in detail lost earnings, known contractual increases and variations in his wage classification. Pfeifer's Exhibits 2.1, 6, 10 concerning his wages to time of trial were admitted (Ex. J.A. 351-367, 402-405), Exhibit 7, concerning future union contract wage increases, was marked and offered into evidence with ruling reserved (Ex. J.A. 359) and testimony of the contents of the contract was admitted through witness Pingree (J.A. 302-313). The lower court did not disagree with Pfeifer's damage projections or testimony, but felt they were inappropriate in view of its application of the total offset method (J.A. 74).

Under the above circumstances, J & L's argument in support of remanding this case to the district court to receive expert testimony on the issues of inflation, cost of living increases, and future interest rates is without merit because J & L failed to present such evidence, and preserve its objection. In addition, the Court below properly applied the total offset method, which is consistent with the existing federal maritime law, is in total conformity with the remedial and compensatory goals of the LHWCA, and which represents an

economically sound, efficient, accurate, just and predictable method of determining an injured longshoreman's lost future earnings.

CONCLUSION

Pfeifer's cause of action against a vessel owned or controlled by his employer, J & L, is valid. The damages were properly calculated in accordance with federal law. The judgment of the Third Circuit Court of Appeals must be affirmed.

Respectfully submitted,

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